

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
WILLIAM F. MARTIN,	:	DETERMINATION
OFFICER OF RAINBOW FOOD MARTS, INC.	:	
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29 :	:	
of the Tax Law for the Period December 1, 1984	:	
through May 31, 1986.	:	

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Petitioner, William F. Martin, officer of Rainbow Food Marts, Inc., 6014 Misty Ridge Lane, Clay, New York 13041, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1984 through May 31, 1986 (File No. 804892).

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York, on June 15, 1988 at 1:15 P.M. Petitioner appeared by Goldberg, Harding and Talev (Harold Goldberg, Esq., of counsel). The Audit Division appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect tax under Tax Law § 1133(a) and, therefore, liable for sales tax due from Rainbow Food Marts, Inc.

FINDINGS OF FACT

1. On December 30, 1986, as the result of an audit, the Division of Taxation ("Division") issued to petitioner, William F. Martin, a Notice and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1984 through May 31, 1986, assessing tax due of \$22,358.70 plus penalty and interest. The notice explained that Mr. Martin, as an officer of Rainbow Food Marts, Inc. ("Rainbow"), was personally liable for taxes determined to be due from the corporation.

2. Rainbow operated a convenience store named Dairy Mart in North Syracuse, New York, during the audit period. Mr. Martin's association with Rainbow came about as a result of his personal friendship with an individual named Warren Newton.

3. Mr. Martin and Mr. Newton became acquainted in 1980 or 1981, when Mr. Newton took over the operation of a Syracuse gasoline service station previously run by a friend of Mr. Martin. In 1981, Mr. Martin moved from Syracuse to Watertown, New York. He and his family received monthly visits from Mr. Newton. During this time, Mr. Newton was having marital problems. He and his wife applied for a \$60,000.00 bank loan. The loan was approved while they were involved in divorce proceedings. Mr. Newton's wife refused to act as a cosigner after the loan was approved. As a favor, Mr. Martin cosigned for the loan.

4. In 1983, Mr. Martin returned to Syracuse where he worked as a shift manager for United Parcel Service ("UPS"). At that time, Mr. Martin knew Mr. Newton as a successful businessman who owned and operated several convenience stores in Syracuse, owned a home in a better section of the city and drove a late model car. He also considered Mr. Newton to be a friend.

5. In late 1983 or early 1984, Mr. Newton came to Mr. Martin with a business proposition. He told Mr. Martin that he was being forced into bankruptcy by circumstances caused by an employee who had embezzled funds from his business, and he asked for Mr. Martin's help in opening a new business. He proposed the following arrangement: A corporation, Rainbow, would be formed to operate a Dairy Mart convenience store. Mr. Martin would be the president and sole shareholder of Rainbow. The real property where the Dairy Mart was located was to be placed in Mr. Martin's name, and after all mortgages were satisfied, Rainbow was to pay a rental to Mr. Martin. Mr. Newton was to be solely responsible for the operation of the Dairy Mart and was to retain any profits. Mr. Martin's name was to be used in connection with the acquisition of loans and vendor credit and to obtain any required licenses because Mr. Newton could not obtain credit or hold property in his own name.

6. Although Mr. Martin agreed to Mr. Newton's proposal, he insisted that his status as corporate officer could last no more than six months. UPS had a personnel policy prohibiting employees from having outside employment or business interests, and Mr. Martin was fearful of losing his job if his association with Rainbow became known.

7. Rainbow's incorporation papers were drafted by Mr. Newton's attorney, Angelo Rinaldi. In all legal matters regarding Rainbow, Mr. Martin allowed himself to be guided by Mr. Newton and Mr. Rinaldi.

8. At the outset, a \$36,000.00 loan was obtained from Key Bank to remodel the premises. Mr. Martin signed as a guarantor of the loan. The loan was secured by a second mortgage on the property. Since the property was valued at approximately \$120,000.00, Mr. Martin did not believe he was placing himself at risk by guaranteeing the loan. With his knowledge, a liquor license was obtained in Mr. Martin's name. A corporate checking account was established, and Mr. Martin signed approximately five checks to get the business started.

9. The Dairy Mart store was opened for business during Thanksgiving week, 1984. At first, Mr. Martin dropped in to see Mr. Newton and the store every few days. Over time his visits decreased.

10. The Dairy Mart was operated by Warren Newton. He hired a manager, Nicholas Bartolotti, to run the day-to-day operations. Mr. Newton kept all of the store's books and records, paid all vendors, collected and deposited cash receipts and had the power to hire and fire employees. Mr. Martin had no involvement with the day-to-day management of the Dairy Mart.

11. In July 1985 Rainbow filed its first State sales tax return. It was signed by Mr. Martin at the direction of Mr. Newton. It was the only sales tax return signed by Mr. Martin on Rainbow's behalf.

12. Shortly after Rainbow began doing business, Mr. Martin learned that Mr. Newton's business practices were the subject of a Federal investigation. He was contacted by agents of the Internal Revenue Service and asked questions regarding his relationship with Warren Newton.

There was no immediate follow-up to this initial contact.

13. After four to six months had passed, Mr. Martin repeatedly asked Mr. Newton to find someone else to act as president and sole shareholder of Rainbow. Mr. Newton insisted that a change was not possible at that time, but he promised to find someone to replace Mr. Martin in another six months. The two men argued and their friendship deteriorated.

14. In the spring of 1986, Warren Newton approached his manager, Nicholas Bartolotti, and asked whether he would like to become a part owner of Rainbow. He told Mr. Bartolotti that Mr. Martin was forced to sell his shares because he was afraid of losing his job at UPS. Mr. Bartolotti agreed to pay Mr. Newton \$60,000.00 in return for which he was to receive a 50 percent interest in Rainbow. Mr. Bartolotti understood that some of this money was to be used by Mr. Newton for business ventures unrelated to Rainbow. Mr. Newton told him that some of the money would be used to pay outstanding sales tax liabilities.

15. Mr. Rinaldi drafted all the legal papers executed in connection with the sale of Mr. Martin's interest in Rainbow to Mr. Bartolotti. Neither Mr. Bartolotti nor Mr. Martin retained his own legal counsel. To consummate the transaction, Mr. Martin signed a bill of sale by which he purportedly sold ten shares of common stock in Rainbow, representing all of his interest in the corporation, to Nicholas Bartolotti. The consideration recited in the document is \$5,000.00. Mr. Martin signed a letter resigning as officer of the corporation. Mr. Bartolotti signed what purported to be the minutes of a joint shareholders and board of directors meeting of Rainbow. Mr. Bartolotti and Mr. Martin are shown as the only persons present. The minutes state that Mr. Martin's resignation was accepted at this meeting, and Mr. Bartolotti "assumed the offices as sole director and as president and director of the corporation and the same was duly accepted." All of these documents were dated March 10, 1986, but were actually executed in May 1986. Mr. Bartolotti assumed the ownership and management of the Dairy Mart on May 20, 1986. Mr. Martin never received the \$5,000.00 recited in the bill of sale.

16. In July 1986, the Division began an audit of Rainbow with a visit to the Dairy Mart convenience store. The auditor interviewed Mr. Bartolotti who at first denied knowing who owned Rainbow. The auditor learned that Mr. Martin was Rainbow's principal officer, but whether that information came from Mr. Bartolotti or elsewhere cannot be determined from the record.

17. By the summer of 1986, Mr. Martin was receiving continual inquiries from Federal agents investigating crimes allegedly committed by Mr. Newton. Since phone calls were made to him at UPS, he was afraid that his job might be jeopardized.

18. The auditor contacted Mr. Martin at his UPS office and requested a meeting to discuss a sales tax audit of Rainbow.

19. On July 10, 1986, Mr. Martin attended a meeting with representatives of the Division. The purposes and methods of the sales tax audit were discussed, and arrangements were made for the auditor to review Rainbow's books and records at the offices of its accountant. At that meeting, Mr. Martin represented himself as the sole shareholder and principal officer of Rainbow. In response to direct questions, he denied that Mr. Newton had any involvement with Rainbow.

20. The auditor reviewed Rainbow's books and records at the offices of its accountant. The review continued over a period of weeks. Through conversations with Rainbow's

accountant, the auditor learned that Mr. Newton had some involvement with the corporation; however, the nature of that involvement was not definitively explained. During the audit, Mr. Martin described Mr. Newton as a consultant to Rainbow and a friend. Mr. Martin continued to maintain that he was the sole owner of Rainbow during the audit period.

21. On September 29, 1986, Mr. Martin, as president of Rainbow, executed a consent fixing Rainbow's tax liability in the amount of \$22,358.70 plus penalty and interest for the period December 1, 1984 through March 10, 1986. Mr. Martin was advised by Rainbow's accountant to sign the consent on these grounds: (1) that this was the lowest tax figure that the Division could be expected to assess; (2) that additional penalties could be assessed if Mr. Martin did not agree to the tax; (3) that if Mr. Martin denied being the owner of Rainbow, at this point, the accountant would bear some responsibility for misleading the Division.

22. While the audit was being conducted, Mr. Newton and his attorney advised Mr. Martin to declare himself solely responsible for Rainbow. He was told that the Dairy Mart would be forced to close if Mr. Newton's connection with Rainbow became known and that all of the parties would suffer financially as a result. As relations between the two men deteriorated, Mr. Newton threatened to inform UPS of Mr. Martin's involvement with Rainbow.

23. In the latter half of 1986, Mr. Martin learned that Mr. Newton was being investigated by the Federal government for bankruptcy fraud. In May 1987, Mr. Newton pleaded guilty to conspiracy, bankruptcy fraud and filing a false tax statement. None of these crimes was directly related to the operation of Rainbow. However, Rainbow fraudulently obtained an investment tax credit through a scheme devised by Mr. Newton. Mr. Martin signed the application for the credit. He later repaid the amount of the credit to the Federal government, although he had not personally received any monies in connection with the credit.

24. The real property owned by Mr. Martin was sold to satisfy the mortgages, including the \$36,000.00 loan from Key Bank. If any monies remained after the mortgages were paid, Mr. Martin did not receive it. He found himself obligated to satisfy the remaining balance of the \$60,000.00 bank loan which he cosigned in 1981. He repaid the amount of the investment tax credit illegally received by Rainbow. By the time of hearing, Mr. Martin had paid out approximately \$67,000.00 to satisfy obligations incurred as a result of his association with Mr. Newton.

#### SUMMARY OF PETITIONER'S POSITION

25. Petitioner maintains that he was not a responsible officer of Rainbow. In support of his position, he asserts the following:

(a) that he was not involved in the day-to-day management of Rainbow, did not hire or fire employees, had no authority to determine which bills were paid and which were not, and received no financial benefit from the corporation;

(b) that in agreeing to be the sole shareholder and principal officer of Rainbow, he was acting out of friendship for Mr. Newton who misled him;

(c) that he continued to portray himself as being solely responsible for the operation of the Dairy Mart primarily out of fear that, if Mr. Newton's connection became known, the Dairy Mart would be forced to close and Mr. Martin would be liable for all outstanding debts;

(d) that Mr. Newton placed Mr. Martin under continual duress by threatening to inform UPS of Mr. Martin's connection with Rainbow;

(e) that Mr. Martin was ignorant of the law and relied entirely on Mr. Newton and Mr. Rinaldi to advise him of his legal obligations; and

(f) that Mr. Newton used other individuals in the same manner in which he used Mr. Martin, causing them all extreme financial hardship.

#### CONCLUSIONS OF LAW

A. The Tax Law imposes personal liability for taxes required to be collected under Article 28 upon every person required to collect such tax (Tax Law § 1133[a]). A person required to collect such tax is defined, in part, as:

"any officer, director or employee of a corporation...who as such officer, director or employee is under a duty to act for such corporation...in complying with any requirement of [Article 28]" (Tax Law § 1131[1]).

Pertinent inquiries in determining whether a person has such a duty to act for the corporation include, inter alia, authorization to sign the corporate tax return, responsibility for management or maintenance of the corporate books, authorization to hire or fire employees, derivation of substantial income from the corporation and stock ownership (see\_\_\_\_, Matter of Cohen v. State Tax Commn., 128 AD2d 1022; Matter of Blodnick v. State Tax Commn., 124 AD2d 437).

B. While one cannot help but be sympathetic to the circumstances in which petitioner now finds himself, it must be noted that petitioner was Mr. Newton's willing victim. He knowingly cooperated with Mr. Newton in creating a corporation to mislead Mr. Newton's creditors. The benefit which he sought to derive from this arrangement was ownership of real property valued at \$120,000.00. Although he was the only officer and shareholder, he ignored the corporation completely until the audit began. At that time, he held himself out as the sole shareholder and principal officer of Rainbow and denied Mr. Newton's deep involvement in the operation of the Dairy Mart. This State's courts have noted that "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves by disregarding their duty and leaving it to someone else to discharge" (Matter of Ragonesi v. New York State Tax Commn., 88 AD2d 707, 708, quoted in Matter of Blodnick v. State Tax Commn., 124 AD2d 437, 438). Having shielded Mr. Newton by declaring himself to be the sole corporate officer responsible for the conduct of Rainbow's business, petitioner cannot now absolve himself of liability by complaining that he did not exercise those corporate responsibilities which were his duty to exercise (Matter of Blodnick, supra).

C. The petition of William F. Martin, officer of Rainbow Food Marts, Inc., is denied, and the Notice and Demand for Payment of Sales and Use Taxes Due issued on December 30, 1986 is sustained.

DATED: Albany, New York

August 25, 1988

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/s/ Jean

Corigliano \_\_\_\_\_  
ADMINISTRATIVE LAW JUDGE